

IN THE
MISSOURI SUPREME COURT
EN BANC

STATE EX REL.)	
TRACY McKEE,)	
)	
PETITIONER,)	
)	No. SC88867
v.)	
)	ST. LOUIS CIRCUIT COURT
THE HONORABLE)	Case No. 0622-CR00039-01
JOHN J. RILEY)	
DIVISION 07,)	
CIRCUIT COURT OF THE)	
CITY OF ST. LOUIS)	
)	
RESPONDENT.)	

ON PRELIMINARY WRIT OF MANDAMUS
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HONORABLE JOHN J. RILEY,
CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

This is an original proceeding in mandamus pursuant to Missouri Supreme Court Rules 84.22 to 84.26, inclusively. On October 15, 2007, Tracy McKee filed a Petition for Writ of Mandamus requesting this Court grant his motion to dismiss for violation of statutory and constitutional right to a speedy trial, or in the alternative, to direct the St. Louis Circuit Court to dismiss with prejudice the case for violation of his statutory and constitutional rights to a speedy trial. On November 2, 2007, Respondent filed an Answer and Suggestions in Opposition to Mr. McKee's Petition for Writ of Mandamus. On November 6, 2007, this Court sustained Mr. McKee's Petition for Writ of Mandamus, ordered an alternative writ to issue, and set the cause for briefing.

Jurisdiction over this matter lies in this Court under the Missouri Constitution, Article V, Section 4(1), and Missouri Supreme Court Rules 84.22 to 84.26, 94.01 to 94.07, and § 545.780.2, RSMo, 2000.¹

¹ All statutory references are to RSMo 2000, unless otherwise indicated.

STATEMENT OF FACTS

On June 5, 2006, following Petitioner's arrest, Petitioner was charged in the Missouri Circuit Court for the Twenty-Second Judicial Circuit with the Class C felony of Tampering in the First Degree, the Class C Felony of Stealing Over \$500.00, the Class A Misdemeanor of Assault 3rd Degree, the Class A Misdemeanor of Resisting or Interfering with an Arrest, Detention, or Stop, the Class B Misdemeanor of Property Damage 2nd Degree and the Class B Misdemeanor of Trespass 1st Degree, where it was alleged that on June 16, 2005, in the City of St. Louis, Petitioner knowingly and without the consent of the owner defaced an automobile. It was further alleged that the defendant attempted to cause physical injury to security officer Beverly Black by pushing her. Next, it was alleged that on March 27, 2006, the defendant knew or reasonably should have known that the officer was making an arrest, and, for the purpose of preventing the officer from effecting the arrest, resisted the arrest of the defendant by fleeing from the officer. Next, it was alleged that on June 4, 2006 the defendant knowingly damaged a window of a 2004 Ford Excursion at 500 North 14th Street, which property was possessed by Jimmy Stinson, by breaking out the passenger side window. Lastly, it is alleged that on March 27, 2006, that the defendant knowingly entered unlawfully in a building located at 604 Pine Street and possessed by

Interpark. (A78-A79). Petitioner was served with an arrest warrant which ordered that he be held on a bond in the amount of \$20,000.00 secured or 10%. (A77).

On August 15, 2006, the Grand Jury returned an indictment with one felony count of Tampering in the First Degree, one misdemeanor count of Assault 3rd Degree, one misdemeanor count of Resisting or Interfering with an Arrest, one misdemeanor count of Property Damage 2nd Degree, and one misdemeanor count of Trespass 1st Degree. Petitioner's bond was set at \$20,000 cash, 19,000 Secured or 10%, plus \$1000 cash only by Judge Edward Sweeney of the 22nd Circuit. (A68-A70)

On September 13, 2006, Petitioner was arraigned by Judge Michael Mullen of the 22nd Circuit. Additionally, the State of Missouri filed a Request for Disclosure and Defense counsel filed its Request for Discovery. Assistant Public Defender Tony Muelenkamp entered for Petitioner and the undersigned Assistant Circuit Attorney entered on behalf of the State. The case was assigned to Division 16 for its initial appearance on October 5, 2006. (A59-A63)

On September 19, 2006, Petitioner filed a Motion to Compel Discovery and Disclosure. (A50-A52). In addition, on September 19, 2006, Petitioner filed a Motion for Speedy Trial. The State received a copy of this motion. This motion was handwritten by Petitioner and was not signed by

his trial counsel. (A45-A46 and A48-A49) This motion was not accompanied by any motion to precede *pro se*.

On October 17, 2006, Assistant Public Defender Geralyn Ruess entered her appearance as counsel for the defendant. (A57) On November 15, 2006, the cause was continued for want of time by the court for trial on January 29, 2007. (A58) On December 4, 2006, the State filed its recommendation letter with the court recommending a pre-trial disposition of 5 years in the Missouri Department of Corrections. (A56) The cause was transferred to Division 7 Honorable John J. Riley in accordance with individual docketing rules.

Defense [Petitioner's] counsel requested that the state delay in testing DNA found at the scene for the reason that she indicated such testing would hinder plea negotiations. On January 31, 2007, the Petitioner with counsel, Assistant Public Defender Geralyn Ruess, and Assistant Circuit Attorney Charles Billings appeared before Judge Riley in Division 7. At that time, Defendant indicated his willingness to plead guilty to the above charges; however, during Judge John Riley's questioning of the petitioner, the petitioner would not admit guilt. Petitioner was therefore not able to proceed with his plea of guilty. On the same day, the State filed Substitute Information in lieu of Indictment. The change reflected in the

substitute information in lieu of indictment was to count I only: a 2004 Ford Excursion was changed to a 2000 Nissan Maxima. (A42-A44).

On February 9, 2007, the cause was continued by request of the Court to April 30, 2007. (A41) On May 22, 2007, the Petitioner filed a Motion to Dismiss for Violation of Constitutional Right to Due Process with Unlawful Restraint and Unreasonable Delay. This motion was handwritten by Petitioner and was not signed by his trial counsel. (A29-A31) This motion was not accompanied by any motion to precede *pro se*. On July 18, 2007, the Petitioner filed a Motion to Dispose Without Trial by a conditional nolle prosequi of the charge of Tampering 1st to the lesser offense of Tampering 2nd Degree or Attempt Stealing in exchange for a guilty plea. This motion was handwritten by Petitioner and was not signed by his trial counsel. (A19-A20) This motion was not accompanied by any motion to precede *pro se*. On July 18, 2007, Petitioner filed a third *pro se* motion requesting a speedy trial. (A18)

On July 27, 2007, the Petitioner with counsel, Assistant Public Defender Geralyn Ruess, and Assistant Circuit Attorney Charles Billings appeared in Division 7 Judge Riley. At that time, Defendant indicated his willingness to plead guilty; once again, however, during the Honorable John Riley's questioning of the petitioner, the petitioner would not admit

guilt. Petitioner was therefore once again not able to proceed with his plea of guilty.

On August 1, 2007, the State received a letter signed by Petitioner making a counteroffer of 3 years in exchange for Petitioner's guilty plea. The court file does not have a copy. On August 8, 2007, the Petitioner filed a Motion Requesting a Speedy Trial. (A12) On August 14, 2007, Petitioner filed a Motion to Dismiss for Violation of Speedy Trial. This motion was handwritten by Petitioner and was not signed by his trial counsel. (A4-A5) This motion was not accompanied by any motion to precede *pro se*. On August 15, 2007, the Petitioner filed a motion to dispose without trial by a conditional nolle prosequi of the charge of Tampering 1st to the lesser offense of Tampering 2nd Degree or Attempt to Steal in exchange for a guilty plea. This motion was handwritten by Petitioner and was not signed by his trial counsel. (A15-A16) This motion was not accompanied by any motion to precede *pro se*.

On August 28, 2007, the Eastern District of Missouri, through the Honorable Kenneth Romines, grants Petitioners Motion to Proceed in Forma Pauperis and denied Petitioner's Petition for Writ of Mandamus. (A11) On September 26, 2007, Petitioner filed a Notice of filing Writ of Mandamus with this Court, regarding the delay of trial in the stealing case

(A9) On October 17, 2007, the Court set the above cause for trial on December 3, 2007.

On October 25, 2007, the State filed an Order for Transportation of Defendant to Police Laboratory and Compelling Defendant to Submit to Taking of Blood and Saliva Samples. This order was signed by the Honorable John J. Riley. (A1-A3). The results of this test will be available prior to petitioner's December 3, 2007 trial date.

POINT RELIED ON

Petitioner Tracy McKee is not entitled to an order compelling the Honorable John J. Riley to grant his motion to dismiss for violation of his rights to a speedy trial and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution and V.A.M.S. § 545.780, RSMo, or in the alternative, to direct the Respondent to dismiss the charges against him, in cause no. 0622-CR00039, with prejudice, because Petitioner was not denied his constitutional and statutory rights to a speedy trial without due process, in that:

(1) Petitioner was represented by counsel throughout this proceeding and the record is absent of any attempt by his counsel to raise a motion in open court; and

(2) In view of the balancing process set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), Petitioner has not suffered an unreasonable trial delay.

State v. Joos, 966 S.W.2d 349, 352 (Mo. App. S.D. 1998)

Myszka v. State, 16 S.W.3d 652, 658 (Mo.App. W.D. 2000).

State v. Morris, 668 S.W.2d 159(Mo.App. E.D. 1984)

State v. Holt, 695 S.W.2d 474 (App. E.D. 1985)

575.780, RSMo.

ARGUMENT:

While a proceeding in mandamus can be an appropriate remedy in speedy trial cases, Petitioner's application does not appear appropriate at this time in this case because the trial court has never denied a motion by Petitioner to dismiss the case for failure to comply with §545.780 RSMo., the speedy trial statute Petitioner cites in his application.

While subsection 2 of §545.780 RSMo. prescribes mandamus as a remedy in speedy trial matters, it does not expressly prescribe mandamus as the remedy of first resort. "The general rule is that a court will issue a writ of mandamus only where it is shown that one requesting the writ has a clear and unequivocal right to the relief requested and a corresponding present, imperative, unconditional duty imposed on the respondent which

the respondent has breached.” Naugher ex rel. State v. Mallory, 631 S.W.2d 370, 374 (App.1982)(citing State ex rel. Sprague v. City of St. Joseph, 549 S.W.2d 873 (Mo. Banc 1977)). While mandamus operates to enforce an existing duty, it should not be brought where that omission of duty is not actual, but only anticipated. State ex rel. University Park Bldg. Corp. v. Henry 376 S.W.2d 614, 618. (Mo. App.1964)(citing State ex rel. Star Publishing Company v. Associated Press, 159 Mo. 410, 60 S.W. 91, State ex rel. Onion v. Supreme Temple Pythian Sisters et al., 227 Mo.App. 557, 54 S.W.2d 468; State ex rel. Bluford v. Canada, 348 Mo. 298, 153 S.W.2d 12.) “There must, therefore, appear a refusal to act before the writ will go”. Id.

Here, the record is bereft of any attempt by Petitioner to raise his motion before the trial court. Though Petitioner's application for a speedy trial was made *pro se*, Petitioner has nonetheless been represented by counsel since early on in the proceedings. Petitioner's counsel could have ensured the motion was brought the matter to the trial court's attention via oral motion, but the trial court record is absent of any such motion on the matter. (A1-A85)

It appears contrary to principles of judicial economy to permit a litigant to leapfrog the trial court and apply to The Supreme Court of the State of Missouri where that litigant could have more simply applied for relief in the trial court. Moreover, to allow Petitioner to proceed here

demanding dismissal for failure to secure a speedy trial, while at the same time delaying his own trial could set a precedent giving future litigants a perverse incentive in that they could delay their trials below in the hopes that a key state's witness might perish or otherwise become unavailable², while at the same time hedging their bets on the outside chance a higher court will dismiss their case for lack of a speedy trial. Until a motion to dismiss is sought and denied by the trial court, an application to this Court seeking that relief is not appropriate for a writ of mandamus.

But beyond procedural considerations, Petitioner's application for a writ of mandamus should be denied because much of the delay in bringing Petitioner's case to trial has been brought on by Petitioner's own requests for continuances which, by law, undercut Petitioner's demand for a speedy trial in this matter.

In his application, Petitioner cites §545.780 RSMo, which states: “If Petitioner announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter.” Four factors determine whether a Petitioner's Constitutional right to speedy trial has been violated: “Length of the delay,

2 Baker is illustrative of a case where a Petitioner complained of a speedy trial violation and simultaneously requested continuances in the hopes a key state's witness – a co-actor in the crime – would become unavailable for trial. Baker at 535-536.

the reason for the delay, Petitioner's assertion of his right to a speedy trial, and the prejudice to Petitioner." Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 22 L.Ed.2d 101 (1972).

While courts have held that a delay of eight months in bringing a criminal case to trial can be considered presumptively prejudicial, State v. Joos, 966 S.W.2d 349, 352 (Mo. App. S.D. 1998)(citing State v. Farris, 877 S.W.2d, 657, 660 (Mo. App. 1994)), the delay in trial alone is not dispositive of a violation of a Constitutional right to a speedy trial, but it is instead merely the threshold which must be crossed before a full analysis of the facts pursuant to the four-point balancing test set out in Barker is made. In this case, the complaint was filed on June 5th, 2006, the Petitioner filed his Motion for Speedy trial on July 18th and August 2nd, 2007, 13 months since the Petitioner's arrest, and this Writ of Mandamus on October 15th, 2007, sixteen months since Petitioner's arrest. In Joos, the Missouri Court of Appeals for the Southern District found that a fifty-three-month delay between Petitioner's incarceration and trial presumed that an inquiry into the delay was in order, but the court then found from its further inquiry into the facts that Petitioner himself contributed to that delay in various ways, Id. at 355,

Here, as in Joos, much of the delay in bringing this matter to trial has been brought on by Petitioner himself. In addition to the

continuances granted in part because Petitioner had new trial counsel, on two occasions, on January 31, 2007 and July 27, 2007, this case has been set for plea of guilty at the request of defense [Petitioner's] counsel but was not concluded because of actions by the defendant. In addition, beginning on at or about January 31st, 2007, defense [Petitioner's] counsel repeatedly asked the State to delay in analyzing DNA on this matter for the reason that it would hinder plea negotiations, which is also an indication defense [Petitioner's] counsel as not prepared for trial. The State complied with the request of defense [Petitioner's] counsel. Delays which are caused by the defense "weigh heavily against" a Petitioner's claim that his right to a speedy trial has been violated. Myszka v. State, 16 S.W.3d 652, 658 (Mo.App. W.D. 2000). In Myszka, Petitioner requested a number of continuances which the Missouri Court of Appeals for the Western District held were chargeable against Petitioner when it rejected his claim that his speedy trial right had been violated, despite the fact that Petitioner claimed those continuances were made by Petitioner's counsel without Petitioner's permission. Id. The court reasoned that Petitioner should have been charged with those continuances requested by his counsel because the trial record contained no protests by Petitioner when those continuances were made by his counsel. Id. Here, as in Myszka, there is no record of Petitioner's objection to the continuance request made by

defense counsel in his case, and therefore Petitioner's request for continuances in this matter should be weighed heavily against Petitioner and as a key factor in the rejection of his claim of a speedy trial violation made here. Further, it is not until the current setting (December 3, 2007) that defense [Petitioner's] counsel has indicated defense is prepared for trial.

In another case with similar facts to the instant case, State v. Morris, 668 S.W.2d 159(Mo.App. E.D. 1984), this Court rejected a Petitioner's claim that his speedy-trial right was violated. In Morris, four continuance requests were filed before Petitioner filed his *pro se* motion to dismiss for failure to obtain a speedy trial, and one continuance after he filed that motion to dismiss. *Id.* At 163. There, citing Barker (*supra*), this Court stated: "...an inordinate delay in asserting the right should weigh against a Petitioner. Appellant's assertion of his right came after he, himself, had repeatedly delayed the trial". *Id.* Here, a continuance request on the behalf of Petitioner was made before and after his requests for a speedy trial. As in Morris, this Court should reject this Petitioner's claim as the delays in bringing this matter to trial, in large part, are a result of the defense's own actions.

But even beyond the fact that Petitioner here has undercut his speedy trial complaint by delaying the proceedings himself, Petitioner has

failed to provide evidence of actual prejudice as required in Barker. Actual prejudice and its effect are the “determinative factor” in the speedy trial balancing test Joos at 354 (citing State v. Davis, 903, S.W. 2d 930, 936 (Mo.App. 1995)). Joos held that Petitioner's claim that he: “...suffered anxiety and weight loss awaiting trial” was insufficient for the requisite showing of actual prejudice for a finding of a Constitutional violation of Petitioner's right to a speedy trial. Id., and further, that Petitioner failed to show that he had suffered actual prejudice as a result of the delay. Here, as in Joos, Petitioner has failed to allege actual prejudice as required under the Barker balancing test. Petitioner's sole allegation concerning prejudice is contained in his petition for a writ of mandamus, where he states: “...the undue delay prejudices Petitioner by delaying his rights to liberty”. That bare allegation is clearly insufficient to show prejudice under Joos as delay alone is not dispositive on the issue of speedy trial, but merely the threshold to commencement of the inquiry. Id. at 352. There is no evidence in the record that Petitioner has been impeded in preparing his defense; in fact, to the contrary, the record indicates Petitioner has continued to work on his trial as evidenced by Petitioner's continued *pro se* filings, such as his request for a copy of the docket sheet in his case.

Lastly, there is no evidence that any delays in Petitioner's case were a direct result of actions by the State to delay Petitioner's trial. (See

Exhibits A1-A-82). In State v. Holt, 695 S.W.2d 474 (App. E.D. 1985), this Court rejected another Petitioner's claim that his speedy trial right was violated and there again made a finding that much of the delay there was the result of continuances brought on by the defense. Id. at 478.

Additionally in Holt, this Court commented on the fact that the record there contained no evidence of any attempt by the State to delay the trial or that it was “purposefully oppressive” Id. State has been prepared for trial and awaiting defendant [Petitioner’s] decision of a plea versus a trial. Here, there is no evidence the State has sought delay.

As the Respondent has not sought delay in this matter, but, rather, the delays have in large part been caused by the actions of the defense itself, Petitioner should not be able to claim violation of his right to a speedy trial.

CONCLUSION

For the reasons set forth herein, Petitioner prays this Honorable Court deny Petitioner’s writ of mandamus and affirm the Honorable John J. Riley, order denying Petitioner’s Motion to dismiss in State of Missouri v. Tracy McKee, in cause no. 0622-CR00039.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2007, two true and correct copy of the attached brief and diskette containing a copy of this brief was mailed, postage pre-paid to:

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And

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I hereby certify that a true and correct copies containing a copy of this brief was mailed, postage pre-paid to:

The Honorable John J. Riley.,
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CERTIFICATE OF COMPLIANCE

I, Charles W. Billings, hereby certify the following. Pursuant to Missouri Supreme Court Rule 84.06(b), this brief was prepared using Microsoft Word, Office 2002, in Book Antigua, 13 point font, and includes the information required by Rule 55.03. The brief does not exceed 31,000 words and 2,200 lines. The word-processing software identified that this brief contains 3,960 words, 443 lines, and 22 pages, including the cover page, signature block, and certificates of service and of compliance.

The diskette filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee Anti-Virus software, which was updated in March 2007, and found virus-free.

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